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Supreme Court, U.S.
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No. 95-1506

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JEROME S. WAGSHAL,

Petitioner, Pro se

v.

Maurice Bramon, *et al.*

and

BARNETT BANKS, INC., *et al.*

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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April 25, 1995

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PETITIONER'S' REPLY BRIEF IN SUPPORT OF
PETITION FOR FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT

Bramon and Barnett,[1] two former, ostensible adversaries, now open allies, oppose the granting of certiorari, thereby seeking to muzzle a challenge to their cozy class settlement which provided benefits only for themselves--the plaintiff class lawyers and the defendants--and not a red cent for the plaintiff class.

I. Bramon And Barnett's Denials Of The Existence of A Conflict In Circuits Cannot Withstand The Plain English Of The Opinions Which Establish That This Conflict In Circuits In Fact Exists

Bramon and Barnett blink reality when they both argue that there is no conflict among the circuits on the issue to which this petition is addressed, namely, the standing of an objecting class member to appeal a district court's approval of a class action settlement

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1. As previously, "Bramon" refers to the plaintiff class representatives and their attorneys, and "Barnett" refers to the defendants. See Petition for Certiorari (hereinafter "Pet.") at 3. The Bramon Opposition will be cited as "Bramon Opp." and the Barnett Opposition as "Barnett Opp."

without having been formally permitted to intervene in the district court pursuant to Rule 24, Fed.R.Civ.P.

The plain English of the cases on this issue establishes beyond reasonable argument that a conflict involving more than half the Federal circuits *does* exist. Even the cases upon which Bramon and Barnett rely recognize the existence of this massive circuit conflict. *See, e.g., Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678 (8th Cir. 1992)("The circuits are divided on this issue, and some have inconsistent holdings.").

Petitioner will not lengthen this reply with detailed refutation of each of Bramon's and Barnett's disingenuous attempts to reconcile irreconcilable decisions. One glaring example will suffice to demonstrate the Respondents' lack of candor regarding the existence of a conflict in circuits.

Both Opposition briefs argue that the Seventh Circuit sides with their position that

formal Rule 24 intervention is required, claiming that *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), held that formal intervention *is* necessary, and that *In the Matter of VMS Partners Litigation*, 976 F.2d 362 (7th Cir. 1992), confirmed this alleged Seventh Circuit position.[2]

The truth is otherwise. In *VMS Partners*, the Seventh Circuit authoritatively interpreted its decision in *Research Corp.* as holding that formal intervention is *not* necessary, stating this point explicitly:

> In *Research Corp.*,...[t]his court...stated that if an unnamed class member...even appears in response to a notice pursuant to Fed.R.Civ.P. 23(e) and objects to the dismissal or compromise, he has a right to appeal from an adverse final judgment. *Id.* at 1060; *accord Armstrong v. Board of School Directors*, 616 F.2d 305 327 (7th Cir. 1980). [976 F.2d at 367]

The panel which decided *VMS Partners* confirmed that, "*Research Corp.* would control in this circuit if [the non-intervening class member] were appealing the approval of the

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[2]. See Bramon Opp. at 10; Barnett Opp. 6.

settlement agreement...." 976 F.2d at 368.[3] However, that panel then applied the opposite rule, as first laid down in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), to somewhat different facts, namely, the appeal of a post-settlement order implementing a previously approved settlement. Concededly, if the *VMS Partners* panel had been writing on a blank slate it probably would have followed *Guthrie*, in holding against standing on any appeal, but it was constrained from doing so by an honest reading of prior Seventh Circuit decisions and the rules governing adherence to prior decisions by other panels in the same circuit. In short, *VMS Partners* confirms the existence not only of a conflict *among* the circuits but also, in the Seventh Circuit at least, a conflict of sorts *within* the circuit itself.

A careful reading of the other decisions discussed by Bramon and Barnett will show that

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[3]. And see the repetition of this holding at 976 F.2d at 368, n. 8: "...*Research Corp.* still controls that issue in this circuit."

their disingenuous explanations of those cases as not creating a conflict of circuits are equally flawed.

The Bramon and Barnett Oppositions also argue that most of the recent decisions follow the *Guthrie* rule. That is so.[4] However, this fact does not diminish the circuit conflict or the need to adopt a uniform Federal rule even if *Guthrie* were correctly decided. However, if *Guthrie* was wrongly decided, as petitioner

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4. But not all. *See, e.g., Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (3rd Cir. 1993). The cert. opponents' attempt to distinguish *Bell Atlantic* on the ground that it was a stockholder derivative action has no basis in law or logic. *Bell Atlantic* considered the standing issue in the precisely same context as courts dealing with Rule 23 class settlements, as evidenced both by its discussion of case law, and the various pronouncements by the Court which apply equally to Rule 23 settlements, including the following: "Plaintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees.... Informational constraints exacerbate collective action and agency problems. The effort to obtain court approval entails the suspension, if not termination, of hostilities. In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process...In seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence..."

maintains, the need is even greater for this Court to establish a revised national rule.

There are two grounds on which petitioner maintains that *Guthrie* was wrongly decided, and that this Court should halt any trend to follow it: first, the practical wisdom of experience underlying the conflicting rules on appellate standing calls for rejection of *Guthrie*. Second, and petitioner maintains, more important, basic constitutional doctrine requires rejection of the *Guthrie* rule.

II. If Practical Reasons Are Determinative, The Rule Permitting Appeal Without Formal Intervention Should Prevail

A. Both Oppositions Ignore The Practical Reasons For Permitting Objectors' Appeals

Both Oppositions have little or nothing to say regarding the fact that the lower courts have articulated fundamentally opposing perceptions about the practical consequences of granting appellate standing *vel non* to non-intervening class settlement objectors.

The circuits which permit appeals by

district court objectors absent formal intervention do so out of concern that appellate review should be freely available because, otherwise, plaintiff class attorneys may more easily get together with defendants in a cozy settlement which benefits both while providing no benefit to the class. "Assuring fair and adequate settlements outweighs [*Guthrie's*] concerns that non-intervening objectors will render the representative litigation 'unwieldy.'"[5] Bramon's opposition simply ignores this policy issue, while Barnett's opposition attempts to dodge it by *ad hominem* attacks on Petitioner's motives in pursuing his objection to the settlement.[6]

This concern about possible neglect of the class by a combination of plaintiffs' class attorneys and defendants recognizes the

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5. *Bell Atlantic Corp. v. Bolger, supra,* 2 F.3d at 1310.

6. Barnett's mean spirited *ad hominem* attacks on Petitioner are distorted and untrue in their essentials. Petitioner will not digress to respond when addressing the ultimate tribunal where principles of law should be of paramount concern.

facts of the real world. The instant case is a classic example of a settlement which provides nothing to the plaintiff settlement class,[7] while enriching the class attorneys and the defendants--and which by Barnett's inferential admission was intended to accomplish precisely that result.[8]

This case is by no means a unique example of the selling out of the interests of a plaintiff class by class attorneys whose overriding priority is obtaining a fee award. This problem repeatedly emerges into public notice, and tends to bring class action litigation, and the administration of justice

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7. The plaintiff settlement class covered purchasers 7 months earlier and 16 months later than the class pleaded in the complaint. Barnett thus purchased immunity from suit far broader than what was charged in the complaint by its settlement with Bramon.

8. Petitioner noted that a Barnett officer acknowledged that the settlement warrants provided for the plaintiff class were "way out of the money" and the settlement was intended to benefit only the lawyers who sued Barnett. Pet.4, n. 2. In reply, Barnett Opp. 9 attempts, with shameless audacity, to turn this fact around by suggesting that there was something improper in Petitioner's obtaining the admission although he had every right to do so since he acting pro se. Barnett thus inferentially admits this statement was made by the Barnett officer.

itself, into disrepute. For example, although no citation is available at this writing, on April 17, 1995, the Third Circuit overturned a major class action settlement involving side-mounted gas tanks on GM pickup trucks as granting inadequate benefit to the class. *See* The Washington Post, April 18, 1995, page D1. *See also*, The Wall Street Journal, Sept. 7, 1994, p. A15, "The Corruption of the Class Action," by John C. Coffee Jr., Professor, Columbia University Law School ("Could the prospect of collecting $70 million have affected [the class attorneys'] willingness to enter a class action settlement that will provide no cash recovery to most of the plaintiff class?").

The countervailing concern expressed in *Guthrie*, that permitting non-intervening objectors to appeal class settlements may make class actions "unwieldy," (815 F.2d at 629) has no basis in experience. As suggested at Pet. 18, Respondents, although predictably

echoing *Guthrie*'s "unwieldy" argument, are unable to point to any pattern of interference with the appellate process in the quarter century of judicial history in those circuits which grant standing to non-intervening objectors, nor indeed any single case wherein "unwieldy" interference occurred.[9]

In short, *Guthrie*'s fear of "unwieldy" appellate procedure is baseless speculation. Why should it be otherwise? Inherently there is unlikely to be a greater volume of dispute on appeal then there are objections at the trial level, and district courts have always managed to handle class settlement objections without succumbing to "unwieldiness."

B. The *Guthrie* Rule Operates to Prevent Appellate Standing By Objectors

Carefully read, Bramon and Barnett use *Guthrie* to construct a jurisprudential shell

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[9]. For example, although Bramon makes the "unwieldy" argument, Opp. at 7, it fails to cite a single example where a class action became "unwieldy" in any circuit permitting appeals by non-intervening objectors. Bramon's Opposition enforces the conclusion that the "unwieldy" argument has gained legitimacy only by repetition, not experience.

game, in which the pea of appellate standing cannot be found under any shell. On the one hand, Bramon argues that all that is necessary to preserve appellate standing is "the relatively simple step of intervening under Rule 24...." Bramon Opp. 6. However, under Barnett's view, Opp. 8, whereas an objector may appear *qua* objector in the district court, the same objector must qualify as a class representative for appellate standing.

Curiously, these conflicting positions can both be traced to the three alternatives for non-intervenors suggested in *Guthrie* and embraced by respondents. Although the better point at which to dissect *Guthrie*'s faulty reasoning would be in a brief on the merits, in summary, *Guthrie*'s three alternatives all have the common thread of creating an unsolvable procedural labyrinth for the objector who wishes to preserve appellate standing. That result is deliberate: It was obviously the *Guthrie* court's purpose to keep

objectors out of appellate fora when it raised the specter that appeal of class action settlements may make class actions "unwieldy."

This Court should overturn this deliberate denial of the appellate process to class settlement objectors.

C. Petitioner Is An Appropriate Party To Bring This Issue Before The Court

Although conceding that Petitioner "is an experienced class action attorney," (Barnett Opp. 4), Barnett argues that certiorari should nevertheless be denied, *inter alia*, because Petitioner intentionally chose not to intervene in the district court. *Id* at 8.

Of course, even if that were true, his choice should scarcely be disqualifying for purposes of this Petition. It would simply have set the stage for challenging *Guthrie*.

However, Barnett's charge that Petitioner deliberately rejected intervention is flat out untrue. It was only prior to his appearance in the district court that Petitioner denied having the status of a party: when Petitioner

first objected in the district court, Barnett responded *in terrorum* by proposing that he be sanctioned under Rule 11, Fed.R.Civ.P., for objecting. In response to that outrageous attempt at intimidation, Petitioner noted, *inter alia*, that he was technically not then a party, and thus not subject to Rule 11.

However, when Petitioner subsequently appeared at the district court hearing, he was admitted *pro haec vice* on motion, without objection from either Bramon or Barnett, and in all the ensuing proceedings Petitioner was treated as a party, and understood himself to be a party. Petitioner has pointed out in detail (Pet. 6-8) all of the ways in which he was treated as a party to the district court proceedings. Neither the Bramon nor Barnett Oppositions dispute the facts that at the district court hearing Petitioner called a witness and presented evidence and argument, that he submitted motions thereafter, at least one of which was granted, and that he even

served interrogatories on both Bramon and Barnett which they both answered without objection--all actions which under the Federal Rules of Civil Procedure only a party may do .

As is true in just about all cases involving the *Guthrie* rule, petitioner as an objector was surprised by the application of that rule to his appeal. And the record strongly suggests that both Bramon and Barnett were equally unaware of the *Guthrie* rule until the last stage of the appeal process. For example, Barnett first sought to have the appeal dismissed on the claim of an untimely Rule 52(b) motion, without ever raising the standing issue.

Thus, this case is typical of the many other cases in which the *Guthrie* rule has surprised plaintiff class settlement objectors. A reading of the cases applying the *Guthrie* rule indicates that in all of them the objectors were similarly caught unawares.

This case, however, presents a better

vehicle for Supreme Court review because of Petitioner's admission *pro haec vice* by the district court, and his reliance on the rule of *Piambino v. Balley*, 757 F.2d 1112, 1121 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); and *Farina v. Mission Investment Trust*, 625 F.2d 1068, 1075 (5th Cir. 1980), discussed at Pet. 20-21, and studiously ignored by both Bramon and Barnett.

III. Denial of Appellate Standing Raises the Same Constitutional Principles As Those Requiring Notice To Class Members Of District Court Actions.

Another important point on which the Respondents' Opposition briefs are silent is the grave constitutional issue raised by *Guthrie*. At Pet. 14-15, Petitioner noted the basic Constitutional principles underlying Rule 23, which require that class members be given notice and an opportunity to object to judicial rulings which may affect them.

Petitioner noted, Pet. 15, that these principles do not evaporate beyond the district court level. For Bramon and Barnett

these principles apparently *do* evaporate on appeal. Neither Opposition even alluded in passing to Constitutional issues.

This Court should not permit principles of Due Process and access to the judicial process to be so casually brushed aside.

CONCLUSION

If the grant of certiorari depends on the existence of a major conflict involving more than half of the Federal circuits, that conflict exists here. If the grant of certiorari depends also on the presence of important policy issues and constitutional issues, such as the need to reverse a denial of access to the judicial system, such reasons also exist here.

For these reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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